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# The Gate is Wide Open: Should There Be a Limit to Judicial Discretion in Pennsylvania's Sexually Violent Predator Hearings?

Lisa D. Bigony\*

## I. Introduction

A seemingly innocent request<sup>1</sup> from a neighboring resident resulted in the tragic death of six-year-old Megan Kanka.<sup>2</sup> Unbeknownst to the Kanka family, the neighboring resident was twice-convicted child molester, Jimmy Timmendequas.<sup>3</sup> In response to this unconscionable event, the New Jersey legislature enacted sex registration and notification laws in 1994, laws which have routinely been referred to as Megan's Law.<sup>4</sup> Soon thereafter, in 1996, the Clinton Administration enacted a federal version of Megan's Law.<sup>5</sup> As of the date of this Comment, all fifty states have enacted a form of Megan's Law to protect the public from potential recidivist sexually violent predator behavior.<sup>6</sup>

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1. Robert J. Martin, *Pursuing Public Protection Through Mandatory Community Notification of Convicted Sex Offenders: The Trials and Tribulations of Megan's Law*, 6 B.U. PUB. INT. L.J. 29, 32 (1996). Timmendequas allegedly used a new puppy dog to entice Megan to come into his house. *Id.*

2. Kathleen V. Heaphy, Comment, *Megan's Law: Protecting the Vulnerable or Unconstitutionally Punishing Sex Offenders?*, 7 SETON HALL CONST. L.J. 913, 913 (1997).

3. *Id.* at 917.

4. *Id.*

5. Susan (Deschler) Oakes, Comment, *Megan's Law: Analysis of Whether it's Constitutional to Notify the Public of Sex Offenders Via the Internet*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1133, 1139 (1999).

6. Maureen S. Hopbell, *Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law*, 42 DUQ. L. REV. 331, 339-40 (2004); see, e.g., 42 PA. CONS. STAT. § 9791(b) (2005).

In all likelihood, it is uncommon for people other than judges, lawyers, victims, and offenders to consider how an offender is designated a sexually violent predator. Because society as a whole will most likely not question a sexually violent predator label, which will follow the offender for the rest of his or her life,<sup>7</sup> it is critical for the legal system to correctly determine this designation. Upon being labeled a sexually violent predator, every time an offender relocates, the offender is required to register with the local police authority, who then notifies the surrounding community of the offender's prior behavior.<sup>8</sup> With the widespread use of the Internet, offenders' information is now published online in the majority of states.<sup>9</sup> In effect, a "sexually violent predator" designation stigmatizes the offender for the rest of his or her life.<sup>10</sup> This designation relies, in large part, upon the testimony of the district attorney's expert witness.<sup>11</sup>

Two Pennsylvania cases have addressed the issue of whether it is proper for an expert's sexually violent predator determination to be based upon unproven allegations.<sup>12</sup> Unproven allegations are those that have not been determined by a jury and that are: 1) not established by the factual basis for a guilty plea, and 2) not supported by the nature of the charges to which the defendant has pled guilty.<sup>13</sup> In both cases, the defendant consistently denied the unproven allegations.<sup>14</sup>

In *Commonwealth v. Krouse*, the defendant pled guilty to one count of indecent assault.<sup>15</sup> In the pre-sentence report, the defendant denied developing feelings for and having a sexual relationship with the victim.<sup>16</sup> The expert's opinion testimony, which concluded that Krouse

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7. *Commonwealth v. Williams*, 733 A.2d 593, 607 (Pa. 1999). "[Sexually Violent Predator] status carries with it serious, life-long repercussions which can put into jeopardy a person's domestic tranquility and personal relationships." *Id.*

8. Hopbell, *supra* note 6, at 340-41.

9. *Id.* at 341-42.

10. *Williams*, 733 A.2d at 607.

11. 42 PA. CONS. STAT. § 9795.4(b) (2005); *Commonwealth v. Krouse*, 799 A.2d 835, 840-43 (Pa. Super. Ct. 2002) (noting that a sexually violent predator designation involves a subjective assessment by the expert witness of the offender's potential future dangerousness, which includes a greater risk of error than objective determinations).

12. *Commonwealth v. Leddington*, No. 01-06221, slip op. at 8 (Pa. C.P. Bucks Aug. 8, 2005); *Krouse*, 799 A.2d at 843-47 (Bowes, J., concurring).

13. *Krouse*, 799 A.2d at 845 (Bowes, J., concurring).

14. *Id.* at 844-45; *Leddington*, No. 01-06221, slip op. at 8.

15. *Krouse*, 799 A.2d at 836. In general, a person is guilty of indecent assault if the person engages in non-consensual, forced (or the threat of force that would prevent resistance by a person of reasonable resolution) compulsion against another whom the person knows is unconscious or whom the person knows is unaware that the indecent contact is occurring. See 18 PA. CONS. STAT. § 3126 (2005). The victim must be less than thirteen years old or must be less than sixteen years old and the offender must be four or more years older than the victim and not married to the victim. *Id.*

16. *Krouse*, 799 A.2d at 846 (Bowes, J., concurring).

was a sexually violent predator, relied in large part on unproven charges of involuntary deviate sexual intercourse that included allegations of oral sex that were *not prossed*.<sup>17</sup> Thus, the expert's opinion testimony was based on unproven allegations that were not introduced into evidence and were consistently denied by the defendant.<sup>18</sup> The Superior Court reversed Krouse's sexually violent predator designation.<sup>19</sup> In so concluding, the majority found insufficient evidence in addition to some statutory factors that weighed against classifying Krouse as a sexually violent predator.<sup>20</sup> Judge Bowes' concurring opinion agreed with the majority's conclusion that the evidence did not clearly and convincingly establish that Krouse was a sexually violent predator.<sup>21</sup> Judge Bowes' opinion emphasized that Krouse's sexually violent predator determination, based primarily upon unreliable hearsay, could not stand.<sup>22</sup>

Similar to the factual scenario in *Krouse*, in *Commonwealth v. Leddington*, the expert's opinion testimony was based, in large part, upon unproven allegations contained in the police report and the probable cause affidavit.<sup>23</sup> The expert's opinion was that Leddington threatened his victim after the molestation, and assaulted another young girl at the same party that evening.<sup>24</sup> Judge Goldberg ruled that these allegations of the defendant's behavior were premised on unreliable hearsay since the evidence was not introduced into the record and the allegations were consistently denied.<sup>25</sup> Thus, the trial court discounted those portions of the expert's testimony in determining Leddington's sexually violent predator status.<sup>26</sup>

This Comment analyzes whether experts in Pennsylvania's Megan's Law hearings should be allowed to rely on law enforcement reports and/or probable cause affidavits that contain unproven allegations in

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17. *Id.* In effect, the charges of involuntary deviate sexual intercourse were dropped against the defendant. *See id.*

18. *Id.* at 844.

19. *Id.* at 842 (majority opinion).

20. *Id.* at 839-42.

21. *Krouse*, 799 A.2d at 844 (Bowes, J., concurring).

22. *See id.* at 845-46; GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 12.2 (3d ed. 1996). "To constitute hearsay, the repeated statement must be offered for the purpose of proving that what the declarant said is true-just as if the declarant were on the witness stand, giving testimony that the proponent wants the trier to believe." *Id.* at 208-09.

23. *Commonwealth v. Leddington*, No. 01-06221, slip op. at 8, 12 (Pa. C.P. Bucks Aug. 8, 2005) (granting defendant's motion in limine to strike expert's opinion regarding allegations of threats and an assault of second victim).

24. *Id.* at 8.

25. *Id.* at 12; Laurie Mason, *Molester Labeled a Violent Predator*, BUCKS COUNTY COURIER TIMES, Aug. 10, 2005, at 1A.

26. *Leddington*, No. 01-06221, slip op. at 12.

determining a sexually violent predator designation. Part II discusses the permissible bases of expert testimony in Pennsylvania generally, and more specifically, within the Megan's Law context. In addition, Part II explores how a sexually violent predator is designated as such in Pennsylvania and what is typically relied upon by experts in both Pennsylvania and in other jurisdictions. Part II also addresses the implications of the confrontation clause in the Megan's Law context. Part III argues that regardless of what experts typically rely upon, it remains within the trial judge's discretion to determine whether the bases of expert opinion testimony are reliable. Nevertheless, Part III suggests that Pennsylvania should require the underlying bases of an expert's testimony in a Megan's Law proceeding to satisfy a factor analysis test. This procedural mechanism will prevent an erroneous sexually violent predator designation so that stigmatizing effects are limited to those offenders who truly deserve such a label.

## II. Background

### A. *Basis of an Expert's Opinion According to the Pennsylvania Rules of Evidence*

Pennsylvania Rule of Evidence 703 allows an expert to base his or her opinion on a police report and/or a probable cause affidavit, provided it is evidence "of a type reasonably relied upon by experts in the particular field."<sup>27</sup> Historically, experts were limited to basing their opinions on firsthand knowledge or on trial records.<sup>28</sup> In accordance with Federal Rule of Evidence 703, Pennsylvania Rule of Evidence 703 has liberalized the permissible bases for an expert's opinion.<sup>29</sup> In *Commonwealth v. Thomas*, the Pennsylvania Supreme Court adopted a rule that allows a medical expert witness to offer an opinion that is based, in part, on otherwise inadmissible hearsay if any expert in the practice of the expert's profession customarily relies on it.<sup>30</sup> Thus, the *Thomas* court took the first step, in the medical context, toward expanding the permissible bases of expert opinion testimony.<sup>31</sup>

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27. PA. R. EVID. 703. The standard set forth in this rule applies in both the criminal and civil context. *Id.*

28. *See Collins v. Hand*, 246 A.2d 398, 404 (Pa. 1968).

29. FED. R. EVID. 703; *see Commonwealth v. Thomas*, 282 A.2d 693, 698-99 (Pa. 1971).

30. *Thomas*, 282 A.2d at 698-99.

31. *Id.* *See also, e.g., Commonwealth v. Daniels*, 390 A.2d 172, 175-78 (Pa. 1978) (admitting opinion testimony in a voluntary manslaughter conviction case based, in part, upon a letter from and a conversation with a doctor); *Jumper v. Jumper*, 362 A.2d 411, 413-14 (Pa. 1976) (admitting testimony from a psychiatrist based, in part, upon reports of

Even though the permissible bases of an expert's opinion have expanded, the underlying facts or data used to reach that opinion must still be reliable.<sup>32</sup> This determination of whether underlying facts or data are of the type "reasonably relied upon" by experts in the subject field pursuant to Rule 703 is a preliminary question for the trial judge.<sup>33</sup> Pennsylvania Rule of Evidence 703 anticipates the trial judge determining the following: "whether the underlying facts are of the type of data upon which experts in the pertinent field reasonably rely upon in forming opinions outside of the litigation process, whether the testifying expert relied upon those facts, and whether it is reasonable for testifying experts to do so."<sup>34</sup>

Pennsylvania Rule of Evidence 703 is certainly not divorced from its companion Rule of Evidence 705, which requires disclosure (rather than admission)<sup>35</sup> of the factual bases of an expert's conclusions.<sup>36</sup> Thus, since an expert can rely on the truth of out-of-court sources,<sup>37</sup> and must name or disclose those sources,<sup>38</sup> an expert may rely on hearsay in reaching his or her opinion. Nevertheless, an expert must ground his or her opinion on reliable data.<sup>39</sup> Thus, it remains within the trial judge's discretion to determine whether expert testimony is admissible, that is, whether the bases relied upon by an expert in reaching his or her opinion are reliable.<sup>40</sup>

### *B. Scope of Permissible Bases for Expert Opinion in Pennsylvania*

Consistent with *Commonwealth v. Thomas*, Pennsylvania Rules of Evidence 703 and 705 are used in various contexts to permit an expert to rely on an array of information that has been determined by trial courts to

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persons who had observed the defendant over a long period of time and upon discussions with members of the mental hospital staff); *Commonwealth v. Wilson*, 369 A.2d 471, 474-76 (Pa. 1976) (admitting opinion of surgeon based, in part, upon consultation with a radiologist and an examination of x-ray films that radiologist purportedly took of the defendant).

32. *Am. Universal Ins. Co. v. Falzone*, 644 F.2d 65, 66 (1st Cir. 1981).

33. Edward W. Ohlbaum, *Ohlbaum on the Pennsylvania Rules of Evidence* § 703.09 (2005).

34. *Id.*

35. PA. R. EVID. 705. Rule 705 differs markedly from FED. R. EVID. 705 in that an expert is required, pursuant to Pennsylvania law, to disclose the bases of his or her opinion. PA. R. EVID. 705 Cmt. "The salient facts must be in the record so that the jury may evaluate the opinion." *Id.*

36. PA. R. EVID. 705.

37. PA. R. EVID. 703.

38. *See supra* text accompanying note 35.

39. *Emigh v. Consol. Rail Corp.*, 710 F. Supp. 608, 612 (W.D. Pa. 1989).

40. *Primavera v. Celotex Corp.*, 608 A.2d 515, 521 (Pa. Super. Ct. 1992).

be reliable.<sup>41</sup> Although experts are typically given wide latitude in determining the bases of their opinion testimony, it is certainly not the case that experts have free range to base opinion testimony on inherently unreliable information.<sup>42</sup> For example, in *Primavera v. Celotex Corp.*,<sup>43</sup> the evidence at issue was medical reports prepared by doctors who did not testify.<sup>44</sup> The Superior Court concluded that the trial court properly permitted the testifying experts to rely on the disputed reports of the non-testifying specialists.<sup>45</sup> The court emphasized that “an ‘expert’ should not be permitted simply to repeat another’s opinion or data without bringing to bear on it his own expertise and judgment.”<sup>46</sup> In effect, the expert’s opinion should not be used as a back door to admit otherwise inadmissible hearsay evidence since “the non-testifying expert is not on the witness stand and truly is unavailable for cross-examination.”<sup>47</sup>

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41. *Commonwealth v. Thomas*, 282 A.2d 693 (Pa. 1971). Expert reliance on a variety of sources may be permissible despite the fact that these sources constitute hearsay. See PA. R. EVID. 703; PA. R. EVID. 705. See also, e.g., *Satler v. Commonwealth Dep’t of Transp.*, 670 A.2d 1205, 1207 (Pa. Commw. Ct. 1996) (permitting a medical doctor to rely on notes of a certified registered nurse in forming an opinion); *Cacurak v. St. Francis Med. Ctr.*, 823 A.2d 159, 172-73 (Pa. Super. Ct. 2003) (“The [medical and psychological] records need to be of the kind that are customarily relied upon by [vocational] experts in [the] profession.” The applicability of the rule depends upon the circumstances of each case, and demands that the trial court exercise its sound discretion.); *In re Glosser Bros., Inc.*, 555 A.2d 129, 140-42 (Pa. Super. Ct. 1989) (permitting a stock valuation expert to rely on appraisal reports); *Maravich v. Maravich*, 504 A.2d 896, 900-01 (Pa. Super. Ct. 1986) (permitting a fire marshal to rely on information supplied by firefighters under his supervision); *Garrett v. Standard Fire Ins. Co.*, 541 S.W.2d 635, 637 (Tex. App. 1976) (permitting a fire investigator to base his opinion on the start of a fire on his conversations with fellow firefighters present during the fire); *Maravich*, 504 A.2d at 900 (citing *Steinhauer v. Wilson*, 485 A.2d 477, 479 (Pa. Super. Ct. 1984)) (permitting a construction expert to base cost estimates on figures provided by various contractors with whom he had consulted, even though the figures were not in the record); *In re Glosser Bros., Inc.*, 555 A.2d at 140-42 (citing *Bolus v. United Penn Bank*, 525 A.2d 1215, 1227 (Pa. Super. Ct. 1987)) (permitting an accountant to rely on tax returns and financial statements in computing lost profits); *In re Glosser Bros., Inc.*, 555 A.2d at 140-41 (citing *Pittsburgh Outdoor Adver. Corp. Appeal*, 272 A.2d 163, 166 (Pa. 1970)) (permitting valuation experts in eminent domain proceedings to base their opinions on appraisals performed by others who are not called to testify as to their appraisals).

42. *Primavera v. Celotex Corp.*, 608 A.2d 515, 521 (Pa. Super. Ct. 1992). “The applicability of the rule permitting experts to express opinions relying on extrajudicial data depends on the circumstances of the particular case and demands the exercise, like the admission of all expert testimony, of the sound discretion of the trial court.” *Id.* See also *Emigh v. Consol. Rail Corp.*, 710 F. Supp. 608, 612 (W.D. Pa. 1989). “An expert must ground their opinion on reliable data.” *Id.*

43. *Primavera*, 608 A.2d at 517.

44. *Id.* at 518.

45. *Id.* at 526.

46. *Id.* at 521.

47. *Id.* at 521-22.

C. *The Sexually Violent Predator Determination in Pennsylvania Under Megan's Law*

Pennsylvania's first Megan's Law was codified in 1995.<sup>48</sup> Megan's Law I detailed the process by which an individual was determined to be a sexually violent predator.<sup>49</sup> Post-conviction, the trial court ordered the Assessment Board to evaluate the defendant and determine the appropriateness of a sexually violent predator classification.<sup>50</sup> The administrative officer of the Assessment Board assigned one of its members to conduct the assessment pursuant to Section 9795.4(b) of the Pennsylvania Consolidated Statutes.<sup>51</sup> The trial court then held a hearing to determine whether the defendant satisfied the criteria set forth in Section 9795.4(b).<sup>52</sup> Under Megan's Law I, the offender bore the burden

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48. Debra Todd, *Sentencing of Adult Offenders in Cases Involving Sexual Abuse of Children: Too Little Too Late? A View from the Pennsylvania Bench*, 109 PENN ST. L. REV. 487, 530 (2004).

49. *Id.* at 531.

50. Commonwealth v. Krouse, 799 A.2d 835, 838 (Pa. Super. Ct. 2002); 42 PA. CONS. STAT. § 9799.3(a) (2005). See also <http://www.pameganslaw.state.pa.us/> (follow "Sexual Offenders Assessment Board" hyperlink) (last visited Nov. 15, 2005). The Sexual Offenders Assessment Board "is an independent board of psychiatrists, psychologists, and criminal justice experts appointed by the Governor, according to statute, to assess all sex offenders convicted under . . . Megan's Law." *Id.*

51. Krouse, 799 A.2d at 838.

52. *Id.* 42 PA. CONS. STAT. § 9795.4(e) (2005). In a Megan's Law hearing, the expert uses the following criteria to evaluate whether the defendant should be labeled a sexually violent predator:

- (1) Facts of the current offense, including:
  - (i) Whether the offense involved multiple victims.
  - (ii) Whether the individual exceeded the means necessary to achieve the offense.
  - (iii) The nature of the sexual contact with the victim.
  - (iv) Relationship of the individual to the victim.
  - (v) Age of the victim.
  - (vi) Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.
  - (vii) The mental capacity of the victim.
- (2) Prior offense history, including:
  - (i) The individual's prior criminal record.
  - (ii) Whether the individual completed any prior sentences.
  - (iii) Whether the individual participated in available programs for sexual offenders.
- (3) Characteristics of the individual, including:
  - (i) Age of the individual.
  - (ii) Use of illegal drugs by the individual.
  - (iii) Any mental illness, mental disability or mental abnormality.
  - (iv) Behavioral characteristics that contribute to the individual's conduct.
- (4) Factors that are supported in a sexual offender assessment filed as criteria reasonably related to the risk of reoffense.

42 PA. CONS. STAT. § 9795.4(b) (2005).



of rebutting by clear and convincing evidence the presumption of being designated a sexually violent predator.<sup>53</sup> The legislative policy behind Megan's Law I was to identify offenders that exemplified recidivist characteristics to enhance community protection.<sup>54</sup>

Although the underlying policy of Megan's Law I survived to present day, Megan's Law II, as currently codified, involves a significant change.<sup>55</sup> Under Megan's Law II, an offender is no longer presumed to be a sexually violent predator.<sup>56</sup> In contrast, "[a]t the hearing prior to sentencing, the court shall determine whether the Commonwealth has proved by clear and convincing evidence that the individual is [a sexually violent predator]."<sup>57</sup> Now, the Commonwealth bears the burden of proving that the offender is a sexually violent predator.<sup>58</sup> Ultimately, "it is the trial court that has sole authority to determine a defendant to be a sexually violent predator."<sup>59</sup>

The change in Megan's Law II as compared to Megan's Law I is significant for a variety of reasons. For one, the Pennsylvania Supreme Court concluded that Megan's Law I failed Fourteenth Amendment scrutiny because the statute placed the burden on the offender to prove that he or she was not a sexually violent predator.<sup>60</sup> In addition, persons designated as sexually violent predators must now undergo lifetime treatment, which includes notification, registration, and counseling procedures, rather than an automatic increased maximum imprisonment term as was the case under Megan's Law I.<sup>61</sup> Failure to comply with the aforementioned lifetime treatment procedures is penalized by imprisonment or probation.<sup>62</sup> Megan's Law II sought to rectify the shortcomings of Megan's Law I by entitling the defendant to the "full panoply of relevant protections which due process guarantees,' including a presumption of innocence."<sup>63</sup> These recent changes to Megan's Law evidence its dynamism; even today, constitutional challenges to Megan's Law are ongoing.<sup>64</sup>

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53. Todd, *supra* note 48, at 531.

54. *Id.* at 532; 42 PA. CONS. STAT. § 9792 (2005).

55. Todd, *supra* note 48, at 532; *see also* 42 PA. CONS. STAT. § 9793(b) (2005).

56. Todd, *supra* note 48, at 532.

57. 42 PA. CONS. STAT. § 9795.4(e)(3) (2005).

58. *Id.*

59. Commonwealth v. Krouse, 799 A.2d 835, 838-39 (Pa. Super. Ct. 2002).

60. Commonwealth v. Williams, 832 A.2d 962, 966-67 (Pa. 2003) (citing *Williams I*, 733 A.2d at 602).

61. *Id.* at 966-67.

62. *Id.*

63. *Williams*, 832 A.2d at 966.

64. Todd, *supra* note 48, at 533.

*D. What Experts in Pennsylvania Typically Rely upon in Determining Sexually Violent Predator Status*

Although there is no statutory enumeration of the permissible bases of an expert's opinion testimony in Megan's Law hearings, there seems to be a pattern as to what experts typically rely upon. Ideally, an expert will interview defendants<sup>65</sup> and/or perform polygraph tests.<sup>66</sup> Experts also base their opinions on published studies that predict the likelihood of recidivist behavior given the defendant's prior conduct as evidenced in the record.<sup>67</sup> Furthermore, experts rely upon reports conducted by third parties employed in psychiatric facilities that tend to show sexually deviant personality traits of the offender.<sup>68</sup>

*E. What Experts in Other Jurisdictions Rely upon in Determining Sexually Violent Predator Status Under Megan's Law*

Other jurisdictions allow experts to base their opinion testimony in Megan's Law hearings on third party records that contain hearsay statements.<sup>69</sup> In some of these jurisdictions, sexually violent predator case law requires the underlying bases of expert testimony to satisfy a reliability standard.<sup>70</sup>

For example, in *People v. Otto*, the Supreme Court of California considered whether expert testimony based on pre-sentence reports that

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65. See, e.g., *Commonwealth v. Prince*, 876 A.2d 988, 996-97 (Pa. Super. Ct. 2005); *Commonwealth v. Meals*, 842 A.2d 448, 454 (Pa. Super. Ct. 2004) (noting that the expert did not interview the defendant). The court recognized that it did not intend to suggest that a sexually violent predator designation cannot be met when the defendant refuses a personal evaluation with a member of the Assessment Board. *Meals*, 842 A.2d at 454. Nevertheless, the court concluded that the defendant was not a sexually violent predator. *Id.*

66. See *Krouse*, 799 A.2d at 841-42.

67. *Id.* In absence of an interview or a polygraph test, the expert based his opinion "specifically on the finding that individuals who have erections to males 'are more likely to recidivate than others that have erections to young girls.'" *Id.* However, the court concluded that the record did not establish that Krouse had erections to males. *Id.*; see also *Meals*, 842 A.2d at 453 (noting that expert's diagnosis of pedophilia was based upon facts in the record and in published studies).

68. See, e.g., *Commonwealth v. Bey*, 841 A.2d 562, 565 (Pa. Super. Ct. 2004) (stating that the expert based his opinion, in part, on a court-ordered pre-sentence report by the Allegheny County Behavior Clinic which offered a diagnostic impression of "Axis I Paraphilia Narcissistic Traits Disorder"); *Commonwealth v. Carter*, 821 A.2d 601, 606-08 (Pa. Super. Ct. 2000) (noting that the expert based his opinion, in part, on juvenile psychiatric evaluations and discharge summaries); *Commonwealth v. Kopicz*, 840 A.2d 342, 352 (Pa. Super. Ct. 2003) (noting that the expert based his opinion, in part, on psychiatric evaluations).

69. See, e.g., *People v. Otto*, 26 P.3d. 1061 (Cal. 2001).

70. See *id.*

contained multiple layers of hearsay was sufficiently reliable to commit the defendant to a state hospital under California's Sexually Violent Predator Act.<sup>71</sup> Under California Law, in sexually violent predator commitment proceedings, Section 6600(a)(3) allows the use of hearsay statements in police reports to show the details of the underlying offense.<sup>72</sup> In *Otto*, the defendant alleged that the use of the pre-sentence reports violated his right to due process.<sup>73</sup> In evaluating whether the hearsay statements used in Otto's sexually violent predator commitment proceeding were sufficiently reliable, the court considered a number of factors including the following: (1) the context in which the statements appeared, (2) transcripts from any preliminary hearing or trial held regarding the predicate conviction, (3) any indicia that the defendant challenged the accuracy of the hearsay statements at the underlying criminal proceeding, and (4) the circumstances surrounding the making of the statements such as spontaneity and consistent repetition, the mental state of the declarant, and whether the hearsay statements were corroborated.<sup>74</sup>

In affirming Otto's commitment, the court approved of the expert's reliance on the pre-sentence reports that contained hearsay statements.<sup>75</sup> The court emphasized that Otto was convicted of a crime to which the hearsay statements related.<sup>76</sup> In addition, Otto admitted that the pre-sentence reports accurately reflected the factual basis for his guilty plea of the predicate offense and did not contain any unproven allegations.<sup>77</sup>

In contrast to California, Ohio does not enumerate factors for courts to consider in determining whether the underlying bases of the expert's opinion testimony are sufficiently reliable in the Megan's Law context.<sup>78</sup> Cook was convicted of one count of gross sexual imposition, which arose from sexual contact with a child.<sup>79</sup> In reversing the appellate court, the Supreme Court of Ohio held that the trial court did not err in conducting Cook's sexually violent predator hearing by relying on pre-sentence investigation reports containing hearsay.<sup>80</sup> The Court noted that Cook did not challenge the accuracy of the pre-sentence investigation reports.<sup>81</sup>

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71. *Id.* at 1067-70.

72. *Id.* at 1065; *see also* CAL. WELF. & INST. § 6600(a)(3) (2005).

73. *Otto*, 26 P.3d. at 1067.

74. *Id.* at 1067-68.

75. *Id.* at 1071.

76. *Id.* at 1068.

77. *See id.*

78. *State v. Cook*, 700 N.E.2d 570, 586-88 (Ohio 1998).

79. *State v. Cook*, No. 1-97-21, 1997 WL 452014, at \*1 (Ohio App. 3d Aug. 7, 1997).

80. *Cook*, 700 N.E.2d at 586-87.

81. *See Cook*, 700 N.E.2d at 587. *But cf.* *Commonwealth v. Leddington*, No. 01-06221, slip op. at 3 (Pa. C.P. Bucks Aug. 8, 2005) (stating that Leddington challenged the

In its decision, the Court analogized a sexually violent predator hearing to a sentencing hearing since both occur after the offender has been convicted of the underlying offense.<sup>82</sup> Since the Ohio Rules of Evidence in both kinds of proceedings do not apply,<sup>83</sup> reliable hearsay, such as police reports, may be used.<sup>84</sup> The Court did not explain what that basic reliability standard entails.<sup>85</sup> Thus, in Ohio, within due process constraints, the trial court has discretion to consider all cogent evidence on the issues, including hearsay evidence, so long as the evidence satisfies a basic reliability standard.<sup>86</sup>

In Massachusetts, experts in sexually dangerous commitment proceedings<sup>87</sup> are prohibited from relying on otherwise inadmissible hearsay police reports.<sup>88</sup> For instance, in *Commonwealth v. Bladsa*, two psychiatrists testified that the defendant engaged in sexual offenses.<sup>89</sup> Their testimony was based upon police reports containing hearsay statements.<sup>90</sup> The court held that the expert testimony was inadmissible hearsay.<sup>91</sup>

The Superior Court of New Jersey in *In re Civil Commitment of A.E.F.*, affirmed the defendant's commitment due to his sexually deviant acts.<sup>92</sup> In dicta, the court addressed whether experts should be able to

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accuracy of "unproven allegations" contained in the probable cause affidavit or other law enforcement documents).

82. *Id.* at 584.

83. *Id.* at 587 (noting that sexually violent predator hearings, since they occur after the offender has been convicted of the underlying criminal offense, are exempt from the Ohio Rules of Evidence due to their similarity to sentencing and probation hearings); *cf.* *Commonwealth v. Butler*, 760 A.2d 384, 388-89 (Pa. 2000) (noting that evidence presented at sexually violent predator proceedings are not specifically subject to the Pennsylvania Rules of Evidence).

84. *Cook*, 700 N.E.2d at 587.

85. *See id.* at 587.

86. *Id.*

87. Brian M. Epstein, Note, *Megan's Law: How Should the State of Massachusetts Apply Its Sex Offender Registry Laws in Light of Other Jurisdictions?*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 247, 250-51 (2002). A person classified as a sexually dangerous person qualifies as a sexual offender. *Id.* at 251. Those who qualify as sex offenders are then classified by the Massachusetts Sex Offender Registry Board based on the likelihood of their potential recidivist behavior. *Id.* Although a sexually dangerous commitment proceeding in Massachusetts is not analogous in all respects to sexually violent predator hearings, the basic idea of both proceedings is that the resulting characterization of the defendant relies, in large part, on expert testimony. *See id.*

88. *Commonwealth v. Bladsa*, 288 N.E.2d 813, 814 (Mass. 1972).

89. *Id.*

90. *Id.*

91. *Id.*; *cf.* *Commonwealth v. Markvart*, 771 N.E.2d 778, 782-84 (Mass. 2002) (noting that the underlying facts contained in police reports and witness statements from a *nol prosequit* case may be used as bases for an expert's testimony so long as the appropriate witnesses are questioned in court).

92. *In re Civil Commitment of A.E.F.*, 873 A.2d 604, 614-15 (N.J. Super. Ct. App.

rely upon unproven allegations in designating a defendant a sexually violent predator in need of involuntary civil commitment.<sup>93</sup> The court noted that had the unproven allegations provided a significant building block in the expert's opinion testimony, the court would have faced a troubling issue.<sup>94</sup> According to the court, significant state action, such as a sexually violent predator commitment, "cannot and should not be based on unproven allegations of misconduct."<sup>95</sup> Even though the unproven allegations were the victim's sworn grand jury testimony, the statements were still unproven, and "more significantly," were "not subject to cross-examination by the accused."<sup>96</sup>

#### *F. The Confrontation Clause and Megan's Law*

Regardless of jurisdiction, when experts rely on unproven allegations in Megan's Law hearings, there exists the potential for a violation of the offender's Sixth Amendment right to confrontation.<sup>97</sup>

The Supreme Court recently addressed the right to confrontation as it relates to out-of-court statements. In *Crawford v. Washington*,<sup>98</sup> the Court held that testimonial statements, regardless of their trustworthiness, are inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant of the statement.<sup>99</sup> A testimonial statement was not fully defined by the Court.<sup>100</sup> Nevertheless, the Court did state that testimonial statements, at minimum, include those statements made during police interrogations.<sup>101</sup>

Although the *Crawford* Court addressed the issue of admitting

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93. *Id.*

94. *Id.* at 614.

95. *Id.*

96. *Id.*

97. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . ." *Id.*

98. *Crawford v. Washington*, 541 U.S. 36 (2004).

99. *Id.* at 68. The Court emphasized that the cross-examination process helps to ensure the use of sufficiently reliable evidence. Specifically, the Court stated that:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' . . . Admitting statements deemed reliable by a Judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

*Crawford*, 541 U.S. at 61.

100. *Id.* at 68.

101. *Id.*

hearsay statements into evidence<sup>102</sup> and did not consider the issue of expert reliance on hearsay statements, the rationale of *Crawford* seems to apply in the Megan's Law context.<sup>103</sup> The court in *Leddington* invoked *Crawford* in concluding that the defendant was denied his right to confrontation when he was not given the opportunity to cross-examine the detective who produced the police report that contained hearsay statements.<sup>104</sup> Moreover, New Jersey courts, albeit in dictum, have noted that it is troublesome for experts to rely on hearsay statements contained in police reports that are not subject to cross-examination.<sup>105</sup>

### III. Analysis

#### A. *Experts in Pennsylvania's Megan's Law Hearings Should be Banned from Relying on Records that Contain Unproven Allegations*

It can be inferred from Pennsylvania Rules of Evidence 703 and 705 that expert testimony must satisfy a reliability standard.<sup>106</sup> While it is recognized that an expert may base his or her opinion on facts lacking in his or her first-hand knowledge,<sup>107</sup> the facts must be supported by evidence in the record.<sup>108</sup> Fulfilling this requirement can become problematic in the Megan's Law context where expert opinion testimony is based upon police reports that contain unproven allegations that have not been pled guilty to nor are substantiated by other evidence in the record.<sup>109</sup> Therefore, the issue of what can be used as reliable bases for an expert's testimony in the Megan's Law context deserves careful consideration, since sexually violent predator designations carry serious, life-long repercussions for the defendant.<sup>110</sup>

Experts in Pennsylvania are encouraged to base their opinion

102. *Id.* at 38.

103. *Commonwealth v. Leddington*, No. 01-06221, slip op. at 10-11 (Pa. C.P. Bucks Aug. 8, 2005).

104. *Id.*

105. *See, e.g., In re Civil Commitment of A.E.F.*, 873 A.2d 604, 614 (N.J. Super. Ct. App. Div. 2005); *In re Civil Commitment of E.S.T.*, 854 A.2d 936, 943-46 (N.J. Super. Ct. App. Div. 2004).

106. *See* PA. R. EVID. 703; PA. R. EVID. 705.

107. *See Commonwealth v. Thomas*, 282 A.2d 693, 698-99 (Pa. 1971).

108. *E.g., Newcomer v. Workmen's Comp. Appeal Bd.*, 692 A.2d 1062, 1066 (Pa. 1997); *Milan v. Commonwealth Dep't of Transp.*, 620 A.2d 721, 727 (Pa. Commw. Ct. 1993) (discussing that expert testimony properly admitted based upon a police accident report not admitted into evidence since trooper's testimony based upon the report became part of the record).

109. *Commonwealth v. Krouse*, 799 A.2d 835, 846 (Bowes, J., concurring); *Commonwealth v. Leddington*, No. 01-06221, slip op. at 8 (Pa. C.P. Bucks Aug. 8, 2005).

110. *Commonwealth v. Williams*, 733 A.2d 593, 607 (Pa. 1999).

testimony upon all relevant information in determining whether the offender is a sexually violent predator.<sup>111</sup> However, the aforementioned case law<sup>112</sup> presupposes that the relevant information upon which the expert bases his or her opinion is true, or at minimum, not undermined or contradicted by other evidence in the record. The clear and convincing evidence standard used by the trial court in determining a sexually violent predator designation is not an easy standard to meet.<sup>113</sup> Therefore, when an expert bases his or her opinion primarily on unproven allegations, the trial court should not hold that the Commonwealth has proved by clear and convincing evidence that the offender is a sexually violent predator.<sup>114</sup> This may explain the recent Pennsylvania trend in which appellate courts are reversing trial courts' designations of defendants as sexually violent predators.<sup>115</sup>

When an expert discloses the bases of his or her expert opinion,<sup>116</sup> and the expert relied upon unproven allegations, appellate courts become skeptical of the expert's overall testimony.<sup>117</sup> Sexually violent predator hearings are "not perfunctory affairs in which parties and judge merely review the trial or guilty plea colloquy proceedings. Rather, they are evidence gathering mechanisms."<sup>118</sup> As gatekeepers, trial court judges seem to demand some minimal level of reliability for the bases of expert opinion testimony.<sup>119</sup>

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111. See *Commonwealth v. Carter*, 821 A.2d 601, 607 (Pa. Super. Ct. 2000).

112. See *supra* text accompanying note 41-2.

113. 42 PA. CONS. STAT. § 9795.4(e)(3) (2005); see also *Commonwealth v. Pitts*, No. 1636 EDA 2002, slip op. at 3 (Pa. Super. Ct. 2005) ("[T]he clear and convincing standard requires evidence that is so clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.").

114. *Pitts*, No. 1636 EDA 2002, slip op. at 18. The Assessment Board did not interview the defendant, and so was unable to show, by clear and convincing evidence, a link between the defendant's disorder and predatory sexually violent behavior. *Id.*; see *Commonwealth v. Plucinski*, 868 A.2d 20, 27 (Pa. Super. Ct. 2005). The Assessment Board did not properly designate the defendant a sexually violent predator because "the Board's diagnosis of [Defendant's mental abnormality] was to some extent undermined by the Board's expert's own assessment of Pulcinski." *Id.*; *Commonwealth v. Krouse*, 799 A.2d 835, 841-42 (Pa. Super. Ct. 2002). The evidence was insufficient to conclude that Krouse suffered from a personality disorder, in light of the fact that: (1) the Board did not interview Krouse, and (2) Krouse's expert interviewed Krouse and determined that he did not have a personality disorder. *Id.*; *Commonwealth v. Meals*, 842 A.2d 448, 452 (Pa. Super. Ct. 2004). The evidence was insufficient to designate the defendant a sexually violent predator. *Id.* "[D]ifficulties [in evaluating the defendant] do not excuse the Commonwealth from meeting its burden of proof." *Id.* at 453.

115. See *supra* text accompanying note 114.

116. PA. R. EVID. 705. "The expert must testify as to the facts or data on which the opinion or inference is based." *Id.*

117. See *supra* text accompanying note 114.

118. *Commonwealth v. Sanford*, 863 A.2d 428, 431 (Pa. 2004).

119. *Commonwealth v. Leddington*, No. 01-06221, slip op. at 9 (Pa. C.P. Bucks Aug.

Nevertheless, Pennsylvania Rule of Evidence 703 further complicates matters because it allows an expert to base his or her opinion on evidence “of a type . . . relied upon by experts in the particular field.”<sup>120</sup> By necessity, Assessment Board experts rely upon third party reports in determining sexually violent predator status, especially with uncooperative defendants who refuse interviews with experts.<sup>121</sup> However, this is certainly not the preferred method of gathering evidence for psychiatrists, psychologists, and criminal justice experts.<sup>122</sup> In fact, this method is not reasonable<sup>123</sup> in light of the consequences and stigmatizing effects<sup>124</sup> of a sexually violent predator designation.

As concurring Judge Bowes in *Krouse* pointed out, there is too much at stake in sexually violent predator hearings to allow experts to base their opinion testimony upon police reports that contain unproven allegations consistently denied by the defendant.<sup>125</sup> Judge Bowes analogized the situation to that of a sentencing court that relies upon unverified hearsay outside the record when imposing a sentence.<sup>126</sup> In the sentencing context, the court is banned from relying upon allegations only established through hearsay.<sup>127</sup> A similar conclusion was reached in a criminal proceeding where the court concluded that the detective’s written account of what a third party witness had told the detective is the type of unreliable, out-of-court declaration that the hearsay rule was designed to exclude.<sup>128</sup>

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120. PA. R. EVID. 703.

121. *Commonwealth v. Meals*, 842 A.2d 448, 450 (Pa. Super. Ct. 2004).

122. See discussion *supra* Part II(D).

123. PA. R. EVID. 703. “[If not admissible into evidence, the facts or data] . . . upon which an expert bases an opinion [must be] . . . of the type reasonably relied upon.” *Id.*

124. *Commonwealth v. Williams*, 733 A.2d 593, 607 (Pa. 1999).

125. *Commonwealth v. Krouse*, 799 A.2d 835, 844-45 (Bowes, J., concurring).

126. *Id.* (citing *Commonwealth v. Berrigan*, 535 A.2d 91, 106 (Pa. Super. Ct. 1987)).

127. *Berrigan*, 535 A.2d at 174-75. The sentencing court attributed to the appellant a serious act of misconduct of which there was no evidence in the pre-sentencing reports or in other portions of the trial record. *Id.* at 174. The sentence took into consideration the judge’s statement that “. . . one of the [defendants] called several jurors several times to hassle these jurors as to why they returned the verdict they did.” *Id.* at 175. When the appellant interrupted the judge to deny and verify the judge’s allegation, the judge failed to support his allegation with a defendant’s name. *Id.* On appeal, the Superior Court emphasized that “a judge may not rely on unverified hearsay outside the record in imposing judgment of sentence.” *Id.* Thus, the Superior Court exercised its authority as gatekeeper to conclude that since the judge “relied on an allegation of uncertain origin which the appellants had no real opportunity to contest, the judgments of sentence [could not] stand.” *Id.*; see also *Commonwealth v. Smithton*, 631 A.2d 1053, 1057 (Pa. Super. Ct. 1993) (noting that sentencing courts are prohibited from relying upon facts of a crime that the jury has discredited).

128. *Commonwealth v. Baez*, 431 A.2d 909, 910-13 (Pa. 1981). Baez, who was convicted of first-degree murder, appealed his life imprisonment sentence. *Id.* at 910. The Commonwealth read directly from a written statement allegedly given by Castillo, a



Thus, given the scenarios in *Commonwealth v. Berrigan* and *Commonwealth v. Baez*,<sup>129</sup> experts in the Megan's Law context should be banned from relying upon police reports and/or probable cause affidavits that contain unproven allegations in determining a sexually violent predator designation.<sup>130</sup> This should especially be the case where the offender consistently denies the allegations.<sup>131</sup> Despite the possibility of stigmatizing effects in the contexts of sentencing and other criminal proceedings, there exists a greater potential for long-term, severe stigmatization in Megan's Law proceedings.<sup>132</sup>

*B. An Offender's Right to Confrontation is Violated When Experts in Megan's Law Hearings Rely on Records that Contain Unproven Allegations*

Assuming that the reasoning in *Crawford* applies in the Megan's Law context,<sup>133</sup> when experts rely upon unproven allegations in designating an offender a sexually violent predator, the offender may not have the opportunity to cross-examine the statements even though the

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third party to the incident, to a police detective. *Id.* at 911. In cross-examining Baez, the Commonwealth read portions of Castillo's statement to Baez and asked whether those assertions were true. *Id.* Like the appellant in *Berrigan*, Baez denied the unproven allegations. *Id.* Castillo's statement to the police was characterized as "an extrajudicial written statement which [incorporated] an extrajudicial oral statement." *Id.* The detective never verified the veracity of his written account. *Id.* Thus, similar to the judge's allegations in *Berrigan*, nothing suggested that the detective's written account was "[a]uthentic or reliable." *Id.* The supreme court concluded that the detective's written account "is precisely the type of unreliable out-of-court declaration the hearsay rule was designed to exclude." *Id.*

129. See *supra* text accompanying notes 127-28.

130. See, e.g., *Commonwealth v. Leddington*, No. 01-06221, slip op. at 12 (Pa. C.P. Bucks Aug. 8, 2005); *Commonwealth v. Krouse*, 799 A.2d 835, 846 (Pa. Super. Ct. 2002) (Bowes, J., concurring). The court stressed that opinions of experts cannot be premised on unreliable allegations that are, in effect, mere suspicion and conjecture. *Id.* at 846.

131. See *Leddington*, No. 01-06221, slip op. at 8.

132. See Hopbell, *supra* note 6. "Megan's Law punishes sex offenders that are required to register in that it subjects them to the possibility of public ridicule, ostracism, job discrimination, housing discrimination, and other forms of ongoing punishment." *Id.* at 342. See also *Vitek v. Jones*, 445 U.S. 480, 495 (1980) (noting that the defendant has an interest in not being arbitrarily classified as well as not being subjected to unwelcome treatment).

133. *In re Civil Commitment of E.S.T.*, 854 A.2d 936, 944 (N.J. Super. Ct. App. Div. 2004). The defendant appealed from a judgment committing him to the Special Treatment Unit pursuant to New Jersey's Sexually Violent Predator Act. *Id.* at 938. The Superior Court noted that since Defendant's proceeding was civil, the Sixth Amendment right to confrontation did not directly apply, but further noted that a sexually violent predator commitment hearing is "pseudo-criminal in nature and should provide as much procedural protection to the committee as the circumstances permit." *Id.*

declarant is available.<sup>134</sup> Lack of cross-examination violates the offender's Sixth Amendment right to confrontation.<sup>135</sup> This potential violation further supports banning experts from relying on unproven allegations in designating an offender a sexually violent predator.

It may be argued that an offender has waived his right to confrontation when he or she pleads guilty to the underlying criminal conviction. However, this argument is likely to fail when unproven allegations are used by an expert in a Megan's Law hearing, which is a proceeding separate and apart from the underlying criminal conviction proceeding.<sup>136</sup> Even if an offender has pled guilty to the underlying criminal conviction, the offender has not waived his or her right to confrontation in the separate hearing that will determine whether the offender is a sexually violent predator.

As previously discussed, Megan's Law hearings are conducted without a jury.<sup>137</sup> Thus, in fairness to the offender, he or she should be given an opportunity to confront the declarant(s) of unproven allegations that an expert relies on in determining a sexually violent predator designation. This procedural safeguard will help to ensure that an expert's opinion is sufficiently reliable.

*C. Pennsylvania Should Incorporate a Factor Analysis Test into Megan's Law to Determine Whether the Underlying Bases of an Expert's Opinion Testimony are Reliable*

Given the potential for stigmatizing effects<sup>138</sup> and constitutional violations,<sup>139</sup> judges and experts in Pennsylvania's Megan's Law hearings should be skeptical of relying on hearsay statements in designating an offender a sexually violent predator. Based upon practices in other jurisdictions, Pennsylvania would be well advised to incorporate into its Megan's Law a factor analysis test that trial judges would use in determining whether hearsay statements that underlie expert testimony are reliable.<sup>140</sup> Trial judges will maintain their discretionary powers since the ultimate sexual violent predator designation will rest with them.<sup>141</sup> The factor analysis test will help to prevent an offender from being erroneously designated a sexually violent predator.

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134. See *Leddington*, No. 01-06221, slip op. at 10-11.

135. *Id.*

136. 42 PA. CONS. STAT. § 9795.4(e)(3) (2005).

137. See discussion *supra* Part II(C).

138. *Commonwealth v. Williams*, 733 A.2d 593, 607 (Pa. 1999).

139. See *supra* Part III(B).

140. See, e.g., *People v. Otto*, 26 P.3d. 1061, 1067-68 (Cal. 2001).

141. See *supra* text accompanying note 59.

The factor analysis test should require the expert, while testifying, to highlight the bases for his or her specific findings for each statutory factor detailed in section 9795.4(b) during the Megan's Law designation proceeding.<sup>142</sup> In substance, this factor analysis test in Pennsylvania could incorporate some of the more important factors used by the Supreme Court of California,<sup>143</sup> such as any indicia that the defendant challenged the hearsay statements relied upon by the expert, whether any independent evidence exists to corroborate the veracity of the hearsay statements, and under what circumstances the hearsay statements were made.<sup>144</sup>

In practice, it would be crucial for the trial judge, in deciding whether there is sufficient evidence to support the existence of the statutory factors listed in Section 9795.4(b),<sup>145</sup> to consider the underlying bases of the expert's testimony. For example, in *Leddington*, the defendant sought to exclude any opinions based on allegations that on the night of the incident in question he molested another young victim and threatened the victim after the assault.<sup>146</sup> An expert used this evidence to support a finding that the following factors in Section 9795.4(b)(1) were met: (i) that the offense involved multiple victims and (vi) that the offense included a display of unusual cruelty by the individual during the commission of the crime.<sup>147</sup> Under the proposed factor analysis test, the aforementioned evidence proffered by the expert, while the expert is still on the stand, would not be examined solely to determine whether the evidence supports the existence of the aforementioned statutory factor(s) under Section 9795.4(b)(1).<sup>148</sup> In addition, the underlying bases of the proffered testimony would also be examined for reliability. For example, in a case like *Leddington*, the trial judge, after inquiring to which statutory factor the proffered evidence relates, could further question whether the defendant challenged the truth of the hearsay evidence, whether there is independent evidence to corroborate the veracity of the hearsay evidence, and the circumstances under which the hearsay statements were made.<sup>149</sup>

Requiring a factor analysis test is reasonable in light of the process used to determine whether an offender deserves a sexually violent predator designation. A comprehensive list of factors to determine

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142. 42 PA. CONS. STAT. § 9795.4(b) (2005); see *supra* text accompanying note 52.

143. See *supra* text accompanying note 74.

144. *Id.* at 1067-68.

145. 42 PA. CONS. STAT. § 9795.4(b) (2005).

146. Commonwealth v. Leddington, No. 01-06221, slip op. at 3 (Pa. C.P. Bucks Aug. 8, 2005).

147. 42 PA. CONS. STAT. § 9795.4(b) (2005).

148. *Id.*

149. See *Leddington*, No. 01-06221, slip op. at 8; see also Otto, 26 P.3d. at 1067-68.

whether an offender is a sexually violent predator is set forth in Section 9795.4(b).<sup>150</sup> Since these factors determine the appropriateness of a sexually violent predator classification, it makes sense to subject the bases relied upon by experts in determining the existence of the factors listed in Section 9795.4(b) to a factor analysis test.

Arguably, Pennsylvania is already moving in the direction of requiring experts to disclose the bases of their testimony. For instance, at least one Pennsylvania court has stated that although Megan's Law does not specifically require courts to make findings regarding the factors enumerated in Section 9795.4(b), it would be in the best interests of trial courts to include on the record specific reasons for finding the defendant to be a sexually violent predator in relation to the statutory factors.<sup>151</sup> The Supreme Court of Ohio has suggested a similar approach.<sup>152</sup> Thus, if future Pennsylvania courts follow the lead of *Krouse*, courts may continue reading beyond the plain language of Megan's Law and suggest that experts make findings regarding the statutory factors listed in Section 9795.4(b). Thus, requiring an additional step of disclosure of the underlying bases of expert testimony seems reasonable.

It would not be unduly burdensome to require the expert to identify the underlying factual bases supporting the existence (or non-existence) of each statutory factor used to designate a sexually violent predator. The expert is in the best position to explain what he or she relied on in reaching his or her decision. The only additional step during the proceeding would be for the expert to reveal the underlying bases to the trial judge. Then, if there was a dispute as to whether the expert was relying on unproven allegations, the dispute could be addressed by the defendant expediently before the trial judge. Thus, the trial judge would be aware of the controversy and could take timely action to remedy the situation. Although it may seem as if this extra step would unnecessarily prolong Megan's Law hearings, it would help to provide a complete record for appellate review and may even limit the number of appeals.<sup>153</sup>

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150. 42 PA. CONS. STAT. § 9795.4(b) (2005).

151. *Commonwealth v. Krouse*, 799 A.2d 835, 842-43 (Pa. Super. Ct. 2002).

152. *Ohio v. Eppinger* 743 N.E.2d 881, 888-89 (Ohio 2001). The Ohio Supreme Court recently defined the specific findings that should be included on the record for a complete appellate review based on Ohio's Megan's Law. *Id.* "The trial court should consider the statutory factors listed in R.C. 2950.09(B)(2), and should discuss on the record the particular evidence and factors upon which it relies in making its determination regarding the likelihood of recidivism. . . ." *Id.*

153. The more often that the Commonwealth meets the clear and convincing evidence standard in Megan's Law hearings, the less often subsequent appeals will follow because the standard of review favors the Commonwealth:

The appropriate standard of review regarding the sufficiency of the evidence is "whether the evidence admitted at trial and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the Commonwealth as

Especially given the recent Pennsylvania appellate court trend of reversing sexual violent predator designations,<sup>154</sup> this extra step may become necessary and may even relieve overburdened dockets.

This additional procedural safeguard of requiring the underlying bases of experts' testimony to satisfy a factor analysis test is reasonable given the underlying rationale of Megan's Law II. As previously discussed, the burden of refuting a sexually violent predator designation rested with the defendant under Megan's Law I.<sup>155</sup> Megan's Law I failed Fourteenth Amendment scrutiny since it did not provide the offender with a presumption of innocence.<sup>156</sup> To provide the offender with the "full panoply . . . of due process guarantees,"<sup>157</sup> under Megan's Law II the burden of proving that the offender deserves a sexually violent predator designation rests with the Commonwealth.<sup>158</sup> Even today, constitutional controversies continue to surround Megan's Law II.<sup>159</sup> Thus, it is logical to subject the expert's opinion to a high level of scrutiny given that part of the underlying rationale of Megan's Law II is to provide the offender with due process protection.

In addition, it is particularly important to provide the offender with due process protection given the nature of Megan's Law hearings. A sexually violent predator designation in Pennsylvania is not an objective determination.<sup>160</sup> Instead, the classifications require a subjective assessment of an offender's potential future dangerousness, which includes a greater risk of error than objective determinations.<sup>161</sup> Therefore, it makes sense to require experts to disclose the underlying bases of their opinion testimony.<sup>162</sup>

Moreover, expert testimony by its very nature raises special concerns. The use of expert testimony necessarily involves a determination by the trier of fact of what to believe.<sup>163</sup> Given that at least

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the verdict winner, is sufficient to support all the elements of the offenses." As a reviewing court, we "may not weigh the evidence and substitute our judgment for that of the fact-finder."

*Krouse*, 799 A.2d 837-38. Thus, judicial resources are conserved when the clear and convincing evidence standard is met. *See id.*

154. *See supra* note 114.

155. Todd, *supra* note 48, at 531.

156. Todd, *supra* note 48, at 531-32.

157. *Commonwealth v. Williams*, 832 A.2d 962, 966 (Pa. 2003).

158. 42 PA. CONS. STAT. § 9795.4(e)(3) (2005).

159. Todd, *supra* note 48, at 533.

160. *Commonwealth v. Krouse*, 799 A.2d 835, 840 (Pa. Super. Ct. 2002).

161. *Id.*

162. *See* PA. R. EVID. 705 Cmt. The rule, as interpreted by case law, "requires disclosure of the facts used by the expert in forming an opinion." *See id.*; Kozak v. Struth, 531 A.2d 420, 423 (Pa. 1987).

163. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 12.2 (3d ed. 1996).

one Pennsylvania court encouraged the expert to state the specific facts upon which he relied upon to support the existence (or non-existence) of the statutory factors listed in Section 9795.4(b),<sup>164</sup> judges should not have too much difficulty in identifying the facts underlying an expert's opinion.<sup>165</sup> However, judges also need to decide which, if any, of the conclusions drawn by experts should be accepted as true.<sup>166</sup>

Pennsylvania should adopt a factor analysis test to ensure that expert testimony is reliable in Megan's Law hearings. Conclusions, like sexually violent predator designations, imply that the underlying set of facts relied upon are true.<sup>167</sup> This may or may not be the case, however, given the underlying sources of information relied upon by the expert in reaching his or her conclusion. The proposed factor analysis test would help to ensure that judges rule based on a fair assessment of the expert's opinion, since experts would be required to reveal not only the specific facts used to reach their opinion, but also the underlying bases of the specific facts used to reach their opinion.

Even the Federal Rules have acknowledged that in appropriate circumstances, experts should disclose the underlying bases of their opinion testimony.<sup>168</sup> Federal Rule of Evidence 703, like Pennsylvania Rule of Evidence 703, allows experts to rely upon facts or data "reasonably relied upon" by other experts in the field.<sup>169</sup> The intent of Federal Rule 703, like Pennsylvania Rule 703, is to be generous in admitting expert testimony.<sup>170</sup> Federal Rule 703 differs from Pennsylvania Rule 703 in that it was amended to block the proponent from disclosing to the jury "otherwise inadmissible" facts or data underlying expert testimony unless the balancing test of Federal Rule 403 where the probative value of disclosure "substantially outweighs" prejudicial effect, is satisfied.<sup>171</sup> Perhaps, in addition to the proposed factor analysis test, Pennsylvania could limit disclosure of the underlying factual bases of experts' testimony. However, Pennsylvania Rule of Evidence 403 differs from Federal Rule of Evidence 403 in that the Pennsylvania version eliminates the word "substantially."<sup>172</sup> It follows that Pennsylvania's "even" balancing test under its version of Rule 403 is

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164. See discussion *supra* note 151.

165. See GRAHAM, EVIDENCE, § 12.2, at 557-59.

166. *Id.*

167. See *id.*

168. See *id.*

169. FED. R. EVID. 703.

170. See GRAHAM, EVIDENCE, § 12.2, at 561-62.

171. FED. R. EVID. 703; FED. R. EVID. 403; CHRISTOPHER MUELLER AND LAIRD KIRKPATRICK, EVIDENCE UNDER THE RULES 606 (5th ed., Aspen Publishers 2004).

172. PA. R. EVID. 403 Cmt.

easier to satisfy than its federal counterpart.<sup>173</sup> Thus, Pennsylvania's limits on disclosure could occur so long as the balancing test articulated in Pennsylvania's version of Rule 403 is satisfied.

#### IV. Conclusion

In the Megan's Law context, experts should not be permitted to rely on hearsay statements that contain unproven allegations in determining whether an offender should be designated a sexually violent predator. In determining whether hearsay statements contain unproven allegations, Pennsylvania's Megan's Law should be amended to include a factor analysis test to help ensure that the underlying bases of an expert's testimony are sufficiently reliable.

Pennsylvania's Megan's Law does not enumerate the permissible bases for an expert's opinion. Case law in contexts other than Megan's Law and the Pennsylvania Rules of Evidence imply that a basic reliability standard must be satisfied in order to designate an offender a sexually violent predator.<sup>174</sup> However, this vague standard has not provided trial courts with much guidance, as evidenced in *Krouse* and *Leddington*. Moreover, a number of trial courts in Pennsylvania that have designated offenders sexually violent predators have been overturned by appellate courts.<sup>175</sup> Thus, Pennsylvania's Megan's Law should be amended to include a factor analysis test. The factor analysis test can be modeled after those procedures employed in other jurisdictions, such as California. With the adoption of these procedural safeguards, there is a greater likelihood that a sexually violent predator designation will be correct and will avoid potential constitutional violations. Trial court judges will be able to retain their discretion, as the final decision of an offender's designation will ultimately rest in their hands. One of the only drawbacks of this proposal is the probable increase in time of Megan's Law hearings. However, this is a small price to pay to protect offenders from an erroneous designation. It is crucial for our judicial system to maintain safeguards to ensure that evidence remains reliable.

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173. See PA. R. EVID. 403. But see FED R. EVID. 403.

174. See *supra* Part II(B).

175. See *supra* text accompanying note 114.